

**United States Department of Labor
Employees' Compensation Appeals Board**

MARK A. ROOD, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Norwalk, CT, Employer**

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**Docket No. 04-663
Issued: June 10, 2004**

Appearances:
Mark A. Rood, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 12, 2004 appellant filed a timely appeal from the October 21, 2003 decision of the Office of Workers' Compensation Programs, finding that he failed to establish that he sustained an injury in the performance of duty. Appellant also appeals the Office's December 15, 2003 decision denying his request for an oral hearing before an Office hearing representative on the grounds that it was not timely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

FACTUAL HISTORY

On August 26, 2003 appellant, then a 29-year-old part-time flexible carrier, filed a traumatic injury claim alleging that on August 12, 2003 he bruised and sustained a contusion of

his left knee. He stated that he was walking on his route and he swerved to the right to miss a prickler bush and the next thing he knew his knee gave out and he fell down on his butt. Appellant stopped working on August 12, 2003. Scott A. Mazzo, an employing establishment supervisor, indicated on the claim form that the employing establishment received notification of appellant's injury on August 26, 2003. In support of his claim, appellant submitted an August 22, 2003 form report from Dr. Michael P. Staebler, a Board-certified orthopedic surgeon, indicating that on August 12, 2003 he sustained a fall. He diagnosed a contusion of the knee and noted appellant's work restrictions and medical treatment.

In a September 2, 2003 letter, Robert J. Pilkington, postmaster of the employing establishment, controverted appellant's claim. He stated that on August 26, 2003 appellant telephoned him to request light-duty work because he had been out of work for approximately two weeks due to an injury. Appellant told Postmaster Pilkington that he sustained an on-the-job injury on August 12, 2003 while working on his route. Postmaster Pilkington noted that, subsequent to this call, appellant never informed any supervisor or the employing establishment that he sustained a work-related injury. He further noted that, when a supervisor took appellant's original telephone call and asked him whether the injury was work related, appellant responded no. Postmaster Pilkington related that appellant contacted the employing establishment's attendance control office, which inquires about whether an absence is due to an on-the-job injury as part of its standard procedures and appellant failed to report that his injury was work related. He stated that appellant failed to immediately notify the employing establishment about his injury and that he is well versed about this policy since he had a prior accident. Postmaster Pilkington believed that something else happened to appellant and that since his sick and annual leave balances were relatively low because he had been out of work for two weeks he had alleged a work-related injury in order to continue to receive payment.

By letter dated September 12, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

On October 3, 2003 the Office received a September 23, 2003 disability certificate from Dr. Staebler indicating that appellant had been under his care for his left knee and that he could return to full-time work with no restrictions on September 24, 2003.

In an October 21, 2003 decision, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The Office found that appellant failed to establish that the event occurred as alleged. On December 3, 2003 appellant requested an oral hearing before an Office hearing representative. His request was postmarked November 21, 2003.

By decision dated December 15, 2003, the Office denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. The Office found that appellant's request which was postmarked November 21, 2003 was received more than 30 days after the issuance of the October 21, 2003 decision denying his claim for compensation and, therefore, he was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he sustained

an injury in the performance of duty on August 12, 2003 could be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered, in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure which is alleged to have occurred.⁴ In order to meet his burden of proof to establish the fact that he sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁵ The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.⁶ The belief of the claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.⁷

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

⁴ *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁵ *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

⁶ *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

⁷ *Charles E. Evans*, 48 ECAB 692 (1997).

ANALYSIS -- ISSUE 1

Regarding the first component, appellant contends that on August 12, 2003 he was walking on his route when his knee gave out and he fell down sustaining a contusion and a bruise on his left knee. An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment, may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁸

Although Dr. Staebler's August 22, 2003 form report indicated that appellant sustained a fall on August 12, 2003 and a diagnosis of a contusion of the knee, it did not provide a description of how appellant injured his knee on August 12, 2003. Similarly, his September 23, 2003 disability certificate revealed that appellant had been under his care for the treatment of his left knee and that he could return to full-time work with no restrictions on September 24, 2003, but it did not provide a history of the injury. Further doubt is cast on appellant's claim by the fact that he did not seek initial medical treatment until August 22, 2003, 10 days after the alleged fall, from Dr. Staebler. In addition, Postmaster Pilkington stated that on August 26, 2003 appellant telephoned him to request light-duty work due to a work-related injury he sustained two weeks ago. He further stated that appellant originally claimed that his injury was not work related and he did not provide immediate notification of his injury to the employing establishment despite being aware of its policy to do so. Mr. Mazzo also indicated that the employing establishment received notification of appellant's injury on August 26, 2003, 14 days after the alleged fall.

Based on the above deficiencies, the Board finds that appellant has failed to carry his burden of proof to establish that he was injured by a fall in the performance of duty on August 12, 2003. Therefore, the Board finds that appellant has failed to establish fact of injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁹ Section 10.615 of the Office's federal regulation implementing this section of the Act provides that a claimant can choose between an oral hearing or a review of

⁸ *Merton J. Sills*, 39 ECAB 572 (1988); *Vint Renfro*, 6 ECAB 477 (1954).

⁹ 5 U.S.C. § 8124(b)(1).

the written record.¹⁰ The regulation also provides that, in addition to the evidence of record, the employee may submit new evidence to the hearing representative.¹¹

Section 10.616(a) of the Office's regulation¹² provides in pertinent part:

“[A] claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office, may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.”

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹³ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,¹⁴ when the request is made after the 30-day period for requesting a hearing¹⁵ and when the request is for a second hearing on the same issue.¹⁶

ANALYSIS -- ISSUE 2

In this case, the 30-day period for determining the timeliness of appellant's hearing request would commence on October 22, 2003 the date following the issuance of the Office's October 21, 2003 decision denying his claim for compensation. Thirty days from October 22, 2003 would be November 20, 2003. Appellant's hearing request would be timely if filed by November 20, 2003.

In this case, the record contains the envelope in which appellant's request was sent, which reveals a postmark date of November 21, 2003. Because his request for a hearing was postmarked more than 30 days after the Office issued the October 21, 2003 decision, the Board finds that it was not timely filed and he is not entitled to a hearing as a matter of right. Further, the Office considered appellant's request and correctly advised him that he could equally well

¹⁰ 20 C.F.R. § 10.615.

¹¹ *Id.*

¹² 20 C.F.R. § 10.616(a).

¹³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁴ *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

¹⁵ *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

¹⁶ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

address the issue in his case through the reconsideration process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.¹⁷

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty. The Board further finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the December 15 and October 21, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 10, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).